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## BEFORE THE ARIZONA CORPORATION COMMISSION

2008 JUL 25 P 4:44

COMMISSIONERSAZ CORP COMMISSION  
DOCKET CONTROLMIKE GLEASON, Chairman  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
KRISTIN K. MAYES  
GARY PIERCE

In the matter of:

DOCKET NO. S-20571A-07-0711

RICK MCCULLOUGH, a single man  
individually and doing business as  
MCCULLOUGH INSURED INVESTMENTSSECURITIES DIVISION'S POST  
HEARING BRIEFTHE KODIAK INVESTMENT GROUP, LLC, an  
Arizona limited liability companyArizona Corporation Commission  
DOCKETEDANITA GENEVA MCCULLOUGH (a/k/a Anita  
G. Maestas, a single woman

JUL 25 2008

Respondents.

DOCKETED BY

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The Securities Division ("Division") of the Arizona Corporation Commission  
("Commission") submits its post-hearing brief as follows:

## I.

## PRELIMINARY ISSUES

A. Parties and Procedural History

On December 31, 2007, the Division filed a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Administrative Penalties and Other Affirmative Action ("Notice"). The Notice alleged that Respondents Rick McCullough ("McCullough"), a single man, individually and doing business as McCullough Insured Investments ("McCullough Insured Investments") and The Kodiak Investment Group, L.L.C. ("Kodiak"), an Arizona limited liability company, engaged in acts, practices and transactions that constituted violations of the Securities Act of Arizona, A.R.S. §§ 44-1841, 44-1842, and 44-1991. Anita Geneva McCullough, a single woman ("A.G. McCullough"), was joined in this

1 matter for the purpose of determining the liability of the marital community.

2 The Division served McCullough and Kodiak on January 2, 2008. On January 9, 2008,  
3 the Division served A.G. McCullough, who subsequently filed a Request for Hearing on January  
4 18, 2008. On February 8, 2008, McCullough filed a Response. A.G. McCullough filed her  
5 Response on February 21, 2008. On March 13, 2008, a pre-hearing conference was held, and the  
6 hearing was scheduled for June 10, 2008.

7 An administrative hearing was held on June 10, 2008. McCullough did not appear for the  
8 hearing. (*See* Transcript of the proceeding @ 7:10 to 7:12). However, A.G. McCullough  
9 appeared. (*See* Transcript of the proceeding @ 8:3 to 8:5).

10 **B. Personal Jurisdiction**

11 McCullough was served at his personal residence in Phoenix, Arizona. In his Response  
12 dated February 8, 2008, McCullough did not contest personal jurisdiction. A.G. McCullough  
13 stated during her testimony at the hearing that she resided in Phoenix, Arizona. (*See* Transcript of  
14 the proceeding at 146:10 to 146:11).

15 Kodiak is a limited liability company doing business in Arizona. The Articles of  
16 Organization for Kodiak, which were filed with the Commission on September 8, 2006, lists the  
17 known place of business as 4018 East Melinda Lane, Phoenix, Arizona 85050. (*See* Exhibit S-  
18 12).

19 **C. Subject Matter Jurisdiction**

20 The Commission has jurisdiction to enforce the provisions of the Securities Act of Arizona  
21 (the "Act"), A.R.S. § 44-1801 et seq. (*See* Article XV of the Arizona Constitution and §44-1971 of  
22 the Act). The Act prohibits: 1) the sale or offer for sale of unregistered securities, A.R.S. § 44-  
23 1841; 2) transactions by unregistered dealers or salesmen, A.R.S. § 44-1842; and 3) the use of  
24 fraud in the offer or sale of securities, A.R.S. § 44-1991. All of these activities are prohibited  
25  
26

1 “within or from” Arizona. Thus, as an initial matter the activities must be shown to be “within or  
2 from” Arizona for there to be subject matter jurisdiction.

3 From September 2005 until October 2006, McCullough offered and sold securities in the  
4 form of promissory notes, within Arizona (*See* Transcript of the proceeding @ 23:4 to 24:8 and  
5 43:2 to 44:5). The securities were not registered pursuant to Articles 6 and 7 of the Act.  
6 McCullough was not registered as a dealer or salesman pursuant to Article 9 of the Act. (*See*  
7 Exhibit 13. *See also* Transcript of the proceeding @ 72:18 to 74:18). And in addition,  
8 McCullough used fraud in the offer and sale of the securities pursuant to Article 13. All of which  
9 are violations of the Act.

10 **D. Facts**

11 1. McCullough conducted business as McCullough Insured Investments. (*See*  
12 Exhibits S-1, S-2 and S-4) McCullough Insured Investments is not a registered trade name with  
13 the Arizona Secretary of State. McCullough is the Manager and sole Member of Kodiak. (*See*  
14 Exhibit S-12).

15 2. McCullough and A.G. McCullough were married on December 7, 2001. A  
16 divorce decree was entered on December 19, 2006. (*See* Exhibit S-29. *See also* Transcript of the  
17 proceeding @ 75:9 to 75:24).

18 3. At all relevant times, A.G. McCullough was the spouse of McCullough and is  
19 joined in this action under §44-2031(C) solely for the purposes of determining the liability of the  
20 marital community.

21 4. At all relevant times, McCullough and A.G. McCullough were acting for their  
22 own benefit, and for the benefit of or in furtherance of the marital community.

23 5. CactusCash, Inc. (“CactusCash”) was an Arizona corporation doing business  
24 principally in Phoenix, Arizona. The Commission administratively dissolved the entity on  
25 October 31, 2007 for failing to file an annual report. McCullough was the President and sole  
26 Director of Cactus Cash. (*See* Exhibit S-12. *See also* Transcript of the proceeding @ 40:10 to

1 41:1 and 74:24 to 75:8).

2 6. At all relevant times, McCullough was a mortgage loan officer for CactusCash.  
3 As a loan officer, McCullough's primary responsibility was to process residential home mortgage  
4 loan applications. (See Exhibit S-9. See also Transcript of the proceeding @ 20:21 to 21:6).

5 7. From in or about September 2005 until October 2006, McCullough entered into  
6 promissory notes with four (4) investors ("Investors") in the total amount of about \$401,712 The  
7 Investors" ranged in age from 65 to 88 years of age. (See Exhibits S-1, S-2, and S-4. See also  
8 Transcript of the proceeding @ 15:1 to 15:14 and 62:14 to 62:25).

9 8. McCullough solicited investors to refinance their home mortgage loans to obtain  
10 funds to invest with him. If the investor agreed, McCullough processed mortgage loan  
11 applications on their behalf. (See Exhibit S-9 @ ACC001061. See also Transcript of the  
12 proceeding @ 79:13 to 80:11, 97:12 to 98:4 and 98:15 to 99:4).

13 9. In each instance, Investors who refinanced their home mortgage loans paid an  
14 origination fee for refinancing their home loan. This fee was made payable to CactusCash. (See  
15 Exhibits S-10 @ ACC002621 and ACC002614; S-11 @ ACC002513, ACC000356,  
16 ACC000361, ACC002594 and ACC002502; S-21; S-22 and S-23. See also Transcript of the  
17 proceeding @ 31:22 to 32:9, 32:19 to 33:15, 36:17 to 37:23, 50:10 to 51:18, 51:23 to 52:25, and  
18 57:13 to 59:2).

19 10. McCullough told Investors that refinancing their existing home mortgage loans to  
20 invest with him ("Investment") was in their best interest because it would increase their monthly  
21 income. (See Exhibits S-1 @ ACC001819 and ACC001827, S-2 @ ACC001832 and  
22 ACC001840 and S-4 @ ACC001813. See also Transcript of the proceeding @ 16:2 to 16:9, 28:3  
23 to 28:17, 49:10 to 49:22, and 102:1 to 102:7).

24 11. McCullough represented to Investors that their investments would be used to  
25 acquire loans for new residential construction (See S-5. See also Transcript of the proceeding @  
26 18:13 to 19:22 and 102:25 to 103:25).

1           12. In at least one instance, McCullough told Investors that the Investment was  
2 guaranteed because the Investment was insured. (See S-24. See also Transcript of the proceeding  
3 @ 104:4 to 106:1).

4           13. McCullough promised Investors high returns on their Investments. (See Exhibits  
5 S-1 @ ACC001818; S-2 @ ACC001831 and S-4 at ACC001812. See also Transcript of the  
6 proceeding @ 17:10 to 17:22, 23:15 to 23:22 and 43:13 to 43:24).

7           14. McCullough assured Investors that he would make monthly payments to repay  
8 their Investments until they were entirely repaid. (See Exhibits S-1 @ ACC001822; S-2 @  
9 ACC001835 and S-4 @ ACC001814).

10           15. At the time of their investment, McCullough entered into promissory notes with  
11 Investors. McCullough entered the agreements on behalf of McCullough Insured Investments  
12 and as the Manager and sole Member of Kodiak. The promissory notes stated the principal  
13 amount, the monthly payment amount and the due date of the loan. (See Exhibits S-1 @  
14 ACC001818; S-2 @ ACC001831 and S-4 @ ACC001812).

15           16. McCullough promised Investors that he would repay the Investment by depositing  
16 monthly payments into Investors' personal bank accounts (See Exhibits S-1 at ACC001822 and  
17 ACC001826; S-2 at ACC001835 and ACC001839 and S-4 at ACC001814).

18           17. In most instances, McCullough promised Investors he would repay the entire  
19 amount of their Investments within 6 to 9 years from the date of investment. (See Exhibits S-1 @  
20 ACC001818; S-2 @ ACC001831 and S-4 @ ACC001812).

21           18. In 2007, McCullough stopped making payments to Investors (See Exhibits S-14.  
22 See also Transcript of the proceeding @ 112:10 to 114:12).

23           19. McCullough used the funds of the McCullough loans to pay his own personal  
24 expenses. (See Exhibit S-17. See also Transcript of the proceeding @ 129:11 to 130:16).

25           20. On November 17 and 18, 2005, McCullough purchased \$42,860 worth of jewelry  
26 with the funds he received for Investment (See Exhibits S-17, S-18 and S-18A. See also

1 Transcript of the proceeding at 69:5 to 72:17 and 133:25 to 134:25).

2       21. In some instances, McCullough used the funds of the Investment to make  
3 improvements to the home he shared with A.G. McCullough during their marriage. The home  
4 was A.G. McCullough's sole and separate property, although she lived in the home with  
5 McCullough. (See Exhibit S-17. See also Transcript of the proceeding @ 85:7 to 85:19, 137:5 to  
6 7:14 and 152:04 to 152:18).

7       22. McCullough commingled business funds with his personal funds. McCullough  
8 also transferred funds from McCullough Insured Investments and/or Kodiak bank account into  
9 his personal bank account which he held jointly with his wife A.G. McCullough. (See Exhibits S-  
10 15, S-16 and S-17. See also Transcript of the proceeding @ 133:4 to 133:12 and 138:7 to  
11 139:16).

## 12 II.

### 13 SECURITIES & UNREGISTERED ACTIVITIES

14 From September 2005 through October 2006, McCullough, McCullough Insured  
15 Investments and Kodiak offered and sold securities, in the form of promissory notes. The  
16 promissory notes were named "fixed rate notes" and "personal notes". (See Exhibits S-1, S-2, S-  
17 4, S-5 and Transcript of the proceeding @ 14:11 to 14:25. See also Transcript of the proceeding @  
18 18:8 to 18:9 and 27:16 to 27:24). During this time, McCullough raised \$411,792 from Investors.  
19 (See Exhibit S-17 and Transcript of the proceeding @ 129:3 to 129:10). These securities were not  
20 registered, in violation of A.R.S. §44-1841. (See Exhibit S-13 and Transcript of the proceeding @  
21 72:20 to 73:4 and 73:23 to 74:2).

22 McCullough, McCullough Insured Investments and Kodiak were not registered as  
23 securities dealers or salesmen when they offered and sold the previously mentioned securities, in  
24 violation of A.R.S. §44-1842. (See Exhibit S-13 and Transcript of the proceeding @ 72:23 to 73:1).

1     **A. Fixed Rate Notes and Personal Notes are Securities.**

2             A.R.S. § 44-1801(26) states, in part, “Security means any note . . . .” .” The Supreme  
 3 Court in *State v. Tober*, 173 Ariz. 211, 841 P.2d 206 (1992), instructed that unless notes fit within  
 4 an exemption under A.R.S. § 44-1843 (exempt securities), A.R.S. § 44-1843.01 (exempt  
 5 government securities) and A.R.S. § 44-1844 (exempt transactions), they are securities for  
 6 purposes of the registration statutes, A.R.S. §§ 44-1841 and 44-1842. It is, of course,  
 7 RESPONDENTS’ burden of proof to prove the existence of an exemption under the Securities  
 8 Act. A.R.S. § 44-2033; *State v. Goodman*, 110 Ariz. 524, 526, 521 P.2d 611 (1974).  
 9 RESPONDENTS in this action submitted no evidence regarding any exemptions from registration.

10             The *Tober* court left open the issue of the appropriate test used to determine whether a note  
 11 is a security for purposes of the securities fraud statute. In *MacCollum v. Perkinson*, 185 Ariz. 179,  
 12 913 P.2d 1097 (App. 1996), the Court of Appeals announced a different test for that issue. As  
 13 *MacCollum* noted, “The securities fraud statute defines a security in even broader terms than do the  
 14 registration statutes.” *Id.* at 186. Even securities that are exempted from the registration statutes  
 15 still fall within A.R.S. § 44-1991. The *MacCollum* court thus adopted the test announced by the  
 16 United States Supreme Court in *Reves v. Ernst & Young*, 494 U.S. 56 (1990), in order to determine  
 17 whether a note is a security for purposes of the securities fraud statute. Under the *Reves*’ test, the  
 18 court “begins with the presumption that a note is a security.” *MacCollum*, 185 Ariz. at 187. “This  
 19 presumption can be rebutted only by a showing that the note bears a strong resemblance to an item  
 20 on the judicially crafted list of instruments that were not intended to be regulated as a security.” *Id.*  
 21 Examples include consumer-financing notes, home mortgages and notes reflecting a bank loan. *Id.*  
 22 If the instrument in question is not similar to those examples, then the court faces the issue of  
 23 whether another category should be added to the list of non-regulated instruments. To determine  
 24 this, the court examines the four *Reves*’ factors. *Id.* The factors include:

- 25             1. The motivation of the parties;
- 26             2. The plan of distribution of the instrument;

1           3.     The public's reasonable expectation; and

2           4.     Whether there is any other risk-reducing factor, such as the existence of another  
3 regulatory scheme.

4           In *MacCollum*, the court had no difficulty determining that the notes were securities for  
5 purposes of the securities fraud statute. Here, the factors also show the same.

6           First, similarly to *MacCollum*, the parties entered into the investment to make money. The  
7 motivation of the instant Investors was to make money. All of them were expecting high returns on  
8 their investment.

9           Second, the distribution of the Investment was to various clients of McCullough. In  
10 contrast, in *MacCollum*, the note was just offered to a single person.

11          Third, the Investors believed they were investing to receive a monthly return on their  
12 investment.

13          Finally, there is no other regulatory or risk reduction scheme covering the "fixed rate notes"  
14 and "personal notes" in which the Investors invested.

15          Thus, the Reves' factors show these notes are securities for purposes of A.R.S. § 44-1991.

16          Moreover, this tribunal heard testimony during the administrative hearing that McCullough  
17 offered and sold promissory notes to investors. McCullough told Investors that their investments  
18 would be used to "to secure real-estate investment property loans." (*See* S-1 @ ACC001818). This  
19 was also stated in the documents Investors signed. (*See* Exhibits S-1, S-2 and S-4). Furthermore,  
20 this tribunal reviewed and admitted into evidence during the administrative hearing promissory  
21 notes which described the investors as "lenders" and McCullough as the "borrower". (*See*  
22 Exhibits S-1 @ ACC001818, S-2 @ ACC001831 and S-4 @ ACC001812). As the borrower,  
23 McCullough promised to repay Investors the principal amount they invested plus a return on their  
24 investment.



**B. McCullough, McCullough Insured Investments and Kodiak are**  
**Not Registered to Sell Securities.**

Neither McCullough, McCullough Insured Investments nor Kodiak are registered securities dealers or salesmen. (*See* Exhibit S-13). Therefore, their offers and sales of securities in Arizona are prohibited by law, whether the securities sold were registered or not. A.R.S. § 44-1842.

**III.**

**OFFERS OR SALES OF UNREGISTERED SECURITIES &**  
**FRAUD IN THE OFFER OR SALE OF SECURITIES**

A.R.S. § 44-1801(21) defines “sale” or “sell” as “a sale or any other disposition of a security or interest in a security for value, and includes a contract to make such sale or disposition.” “Offer to sell” and “offer for sale” are defined in A.R.S. § 44-1801(15) as including “an attempt or offer to dispose of, or solicitation of an order or offer to buy, a security or interest in a security for value.” These definitions apply when a transaction involves securities, as previously discussed. McCullough offered and sold promissory notes to Investors. A promissory note is a common example of a “note” which is defined as a “security” under A.R.S. § 44-1801(26).

Fraud in connection with an “offer to sell or buy” or the “sale of purchase of securities” violates A.R.S. § 44-1991. This includes the use of untrue statement of material fact and omissions in the sale of securities. *Id.* The standard for determining whether the omitted fact is material, one must consider whether a reasonable investor would have wanted to know the omitted fact *prior* to investing. *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887, 892 (1981). (Emphasis added). This tribunal heard testimony during the administrative hearing that McCullough made untrue statements of material fact or omitted facts in the offer and sale of securities to Investors. In addition, there is undisputable documentary evidence that McCullough used fraud to convince Investors to invest with him and lull them after McCullough stopped making payments.

1  
2 **A. Bernice Apodaca**

3 **1. Offer and Sale of Security**

4 McCullough offered and sold Apodaca two promissory notes. Apodaca entered the first  
5 promissory note with McCullough on October 14, 2005. McCullough told Apodaca that her  
6 investment would be used to obtain "real-estate investment property loans." (See Exhibit S-1 @  
7 ACC001818). (See Exhibit S-1). McCullough promised Apodaca that she would receive monthly  
8 payments of \$500.00 which would repay her principal investment and interest. McCullough also  
9 told Apodaca that the monthly payment would pay for the increase in her mortgage payment and  
10 increase her monthly income. McCullough represented to Apodaca that she would receive these  
11 payments for 6 years, until November 2011.

12 Apodaca invested \$35,000. Apodaca received the funds to invest with McCullough by  
13 refinancing her home mortgage. McCullough had been Apodaca's loan officer so she trusted his  
14 advice about the investment. Although Apodaca had some reservations about her inability to pay  
15 the increased mortgage loan, McCullough assured her that he would make the monthly payments  
16 to her which would provide her with the necessary funds to make the increased mortgage  
17 payment. As a result of refinancing, Apodaca paid CactusCash \$8,100 in loan origination fees  
18 and another \$300 for the cost of having her home appraised. (See Exhibit S-23 @ ACC000169.  
19 See also Exhibit S-23 @ ACC000144) Apodaca received \$37,139.89 from her refinanced  
20 mortgage loan. (See Exhibit S-11 @ ACC000138 and ACC000166 and Transcript of the  
21 proceeding @ 30:10 to 30:14. See also Exhibit S-23 @ ACC000168, ACC000166 and  
22 ACC002004). After closing on the loan, Apodaca gave McCullough the entire \$37,139.89.  
23 McCullough then returned \$2,139.89 to Apodaca. (See Exhibit S-1 @ ACC01824 and Transcript  
24 of the proceeding @ 26:6 to 26:8). Apodaca's remaining \$35,000 was invested with McCullough  
25 and McCullough Insured Investments. (See Exhibit S-1 and Transcript of the proceeding @ 27:3  
26 to 27:11)

1 Subsequently, Apodaca made another investment with McCullough on September 8,  
2 2006. Again, Apodaca refinanced her home solely for the purpose to obtain the funds to invest  
3 with McCullough. (See Exhibit S-1 @ ACC001827) This time Apodaca received \$30,287.06 for  
4 refinancing her home mortgage. (See Exhibit S-10 @ ACC002618 and ACC002620). In this  
5 instance, Apodaca invested an additional \$13,000 with McCullough and Kodiak for a total  
6 investment \$48,000. (See S-1 @ ACC001825, ACC001826 and ACC001827. See also Transcript  
7 of the proceeding @ 38:4 to 38:16). However, Apodaca's home loan increased, as well, to  
8 \$217,000. (See Exhibit S-10 @ ACC002620 and Transcript of the proceeding @ 36:21 to 37:10).

9 As a result of the new home loan, Apodaca paid CactusCash \$1736 in loan origination  
10 fees, \$5208 in broker fees and \$995 in loan processing fees for a total of \$7,939. (See Transcript  
11 of the proceeding @ 37:13 to 37:23). Apodaca relied upon McCullough's promise to repay the  
12 investment. Apodaca made her second investment based upon McCullough's representations that  
13 she would receive \$850 per month in addition income for 5 years. (See Transcript of the  
14 proceeding @ 65:3 to 65:22 and 66:5 to 66:10)

## 15 2. Fraud in connection with Offer and Sale of Security

16 Apodaca is 80 years old. (See Transcript of the proceeding @ 62:19 to 62:20). She is  
17 retired and lives on a fixed income. (See Transcript of the proceeding @ 63:3 to 63:4 and 63:22 to  
18 63:24) Although Apodaca receives income from social security and has a retirement savings, she  
19 could not afford the additional expense of an increase to her home mortgage. (See Transcript of  
20 the proceeding @ 64:3 to 64:7 and 67:3 to 67:4). McCullough was aware of this as her loan officer.

21 McCullough made material misrepresentations and omissions in the offer and sale of the  
22 Investment to Apodaca. McCullough misrepresented to Apodaca that he would repay her  
23 investment when in fact McCullough did not have the financial resources to repay her loan. (See  
24 Exhibit S-1. See also Transcript of the proceeding @ 78:11 to 78:24). Nor did McCullough have  
25 the personal assets or the income to guarantee the investment or repay Apodaca. (See Transcript  
26 of the proceeding @ 78:11 to 78:24). This is likely the reason why McCullough's payments to

1 Apodaca stopped. (See Exhibit S-17 and Transcript of the proceeding @ 132:23 to 133:3).

2 Moreover, McCullough misrepresented to Apodaca that her investment would be used to  
3 obtain real estate loans. (See Exhibit S-1 @ ACC001818). However, McCullough used the funds  
4 to pay his personal expenses, purchase jewelry for his wife and make improvements to the home  
5 he shared with his wife, A.G. McCullough. (See Exhibits S-17, S-18 and Transcript of the  
6 proceeding @ 130:2 to 130:8 and 137:5 to 137:14).

7 Apodaca relied upon McCullough representations when she invested with him because  
8 she trusted him. (See Transcript of the proceeding @ 66:5 to 66:10). Since McCullough has  
9 stopped Apodaca finds her self without enough money to purchase prescription medication and  
10 pay for her basic needs. (See Transcript of the proceeding @ 67:3 to 68:7)

11 **B. Dorothy Resler**

12 **1. Offer and Sale of Security**

13 McCullough also offered and sold two promissory notes to Resler. Resler entered into her  
14 first promissory note with McCullough in October 2005. (See Exhibit S-2 @ ACC001830,  
15 ACC001831 and ACC001832). Resler invested additional monies with McCullough in  
16 September 2006. McCullough also told Resler that her investment would be used to “secure real-  
17 estate investment property loans”. (See Exhibit S-2 @ ACC001831). Resler’s promissory notes  
18 were similar to the notes Apodaca entered into with McCullough, McCullough Insured  
19 Investments and Kodiak. (See Exhibits S-1 and S-2. See also Transcript of the proceeding @  
20 44:16 to 44:18).

21 Resler’s initial investment was \$45,000. (See Exhibit S-2). Resler obtained the funds to  
22 invest by refinancing her home mortgage. Resler received \$49,766.85. (See Exhibit S-11 @  
23 ACC002506, ACC000360 and ACC000358). Resler paid CactusCash \$8,312.50 in loan  
24 origination fees, plus \$300 for the cost of a home appraisal. Resler gave McCullough the  
25 \$49,766.85. (See Exhibit S-21 @ ACC000361). Shortly thereafter, McCullough returned  
26 \$4,766.85 to Resler. (See Exhibit S-2 @ ACC001837) Resler invested the remaining \$45,000

1 with McCullough and McCullough Insured Investments. (See Transcript of the proceeding @  
2 43:13 to 43:20). McCullough promised Resler that she would receive a monthly payment of \$625  
3 for 6 years. (See Exhibit S-2 @ ACC001831 and Transcript of the proceeding @ 43:21 to 43:24).  
4 Following the first mortgage loan refinance, Resler's mortgage loan was \$166,250. As her loan  
5 officer, McCullough was aware of Resler's monthly income and knew that she could not afford  
6 to make her mortgage payments if his payments to her stopped. (See Transcript of the proceeding  
7 @ 65:23 to 66:17 and 66:18 to 67:2).

8 Resler's made a second investment was for \$13,750. (See Transcript of the proceeding @  
9 59:3 to 59:15). Resler relied upon McCullough's promise to repay the loans. See Transcript of the  
10 proceeding @ 66:5 to 66:17). Resler added additional funds to her initial investment to increase  
11 her total investment with McCullough, thus bringing her total investment to \$58,750. (See Exhibit  
12 S-2 @ ACC001839 and Transcript of the proceeding @ 59:3 to 59:15 and 48:2 to 58:8). However,  
13 this time her investment was with Kodiak. McCullough told Resler that with an increased  
14 investment her monthly payment would increase to \$850 per month for the next six years. See  
15 Exhibit S-2 and Transcript of the proceeding @ 48:9 to 48:14). Once again, McCullough  
16 represented to Resler that her investment would be used to acquire real estate loans. (See Exhibit  
17 S-2 @ ACC001831).

18 Resler refinanced her home mortgage for the sole purpose of obtaining funds to  
19 investment with McCullough and Kodiak. (See Exhibit S-2 @ ACC001840 and See Transcript of  
20 the proceeding @ 49:14 to 49:22). Resler received \$21,425.52. (See Exhibits S-3 and S-22 @  
21 ACC000501, ACC002073 and ACC000502 and Transcript of the proceeding @ 60:13 to 60:20).  
22 As a result, Resler's home mortgage increased from \$166,250 to \$205,000. (See Transcript of the  
23 proceeding @ 51:1 to 51:7 and 56:17 to 56:21). Furthermore, Resler paid CactusCash a total of  
24 \$9,000 in fees, \$8,200 in loan origination fees for this mortgage loan and an \$800 broker fee.  
25 (See Exhibits S-3 @ ACC00123; S-2 and S-22 @ ACC000502 and ACC00535 and Transcript of  
26 the proceeding @ 58:3 to 59:2).

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**2. Fraud in connection with Offer and Sale of Security**

Resler is 89 years old. She is retired and lives on a fixed income. (See Transcript of the proceeding @ 62:19 to 62:20 and 63:3 to 63:4). Resler could not afford an increase in her home mortgage. Resler's primary source of income is social security. (See Transcript of the proceeding @ 63:18 to 63:21 and 66:5 to 67:2).

McCullough made material misrepresentations and omissions in the offer and sale of the Investment to Resler. McCullough misrepresented that he would make monthly payments to repay the Investment since he did not have the personal assets or personal income to repay Resler or guarantee her repayment. (See S-2 @ ACC001831 and ACC001839 and Transcript of the proceeding @ 66:7 to 66:17 and 78:11 to 78:24). Resler relied upon McCullough's promise to repay her investment. (See Transcript of the proceeding @ 66:5 to 66:6 and Exhibits S-2 @ ACC001835 and S-2 @ 001839). McCullough knew that Resler could not afford to repay her mortgage loan if he failed to repay her. (See Transcript of the proceeding @ 65:23 to 66:10 and 66:22 to 67:2). McCullough was her loan officer and was aware of her monthly income and personal assets. (See Transcript of the proceeding @ 65:23 to 66:10 and 66:22 to 67:2) However, McCullough still told Resler that this investment was in her best interest. (See Exhibit S-2 @ ACC001832)

Furthermore, McCullough did not inform Resler that her investment would be used to make improvements on his home and pay personal expenses, including jewelry for his wife. (See Exhibits S-17, S-18 and Transcript of the proceeding @ 85:7 to 35:16, 129:22 to 130:1, and 130:2 to 130:12).

**C. Philip and Trudy Daley**

**1. Offer and Sale of Security**

Moreover, McCullough offered and sold the Daley's a promissory note. McCullough represented to them that the investment would be used to build new homes which would be

1 eventually sold for more than their purchase price. (See Transcript of the proceeding @ 103:1 to  
2 103:5) McCullough told the Daleys that their investment would be with McCullough Insured  
3 Investments. (See Transcript of the proceeding @ 103:6 to 103:10).

4 The Daleys refinanced their home loan for \$273,500 to obtain the funds to invest. (See  
5 Exhibit S-27) The Daleys turned over the proceeds of their loan to McCullough who in turn  
6 returned \$3500 to the Daleys. (See Transcript of the proceeding @102:20 to 102:22). The Daleys  
7 invested the remaining \$270,000 with McCullough in December 2005. (See Exhibit S-4 and  
8 Transcript of the proceeding @102:15 to 102:19). McCullough represented to the Daleys that they  
9 would receive a monthly payment of \$3,150 for their investment. (See Exhibit S-5) McCullough  
10 provided the Daleys with information which supported his claim to pay them \$3,150 per month.  
11 (See Exhibit S-4).

12 The Daleys had planned to use the extra monthly income to make improvements on their  
13 new home and reduce Philip Daley's work hours. (See Transcript of the proceeding @102:1 to  
14 102:7 and Exhibit S-4). They told this to McCullough.

## 15 2. Fraud in connection with Offer and Sale of Security

16 The Daleys are 65 and 59 respectively. (See Transcript of the proceeding @ 62:23 to  
17 62:25). Both Trudy Daley and Philip Daley work full-time. (See Transcript of the proceeding @ 96:  
18 17 to 96:18 and 119:24 to 120:7). The couple invested with the expectation that the extra income  
19 would make it easier for Philip Daley to reduce the number of hours he works, and eventually retire.  
20 (See Transcript of the proceeding @100:19 to 100:23 and 120:16 to 120:23) However, McCullough  
21 stopped making payments. So, they must both must work full-time to earn sufficient earnings to  
22 meet their monthly expenses. (See Transcript of the proceeding @ 119:24 to 120:7). They have  
23 drained their savings accounts and have found it necessary to borrow money to meet their financial  
24 obligations. (See Transcript of the proceeding @119:1 to 119:14).

25 The Daleys trusted McCullough because he had been their loan officer in the past. (See  
26 Transcript of the proceeding @ 97:10 to 99:4). The Daleys had just purchased a new home and were

1 planning to turn it into their dream home. (See Transcript of the proceeding @102:12 to 102:14) The  
2 Daleys told McCullough of their plans to improve their home. McCullough recommended the  
3 Investment as a means for them to have the extra money to make improvements on their home. (See  
4 Transcript of the proceeding @102:12 to 102:14)

5 McCullough made material misrepresentations and omissions in the offer and sale of the  
6 Investment to the Daleys. First, McCullough represented to the Daleys that their investment with  
7 him was guaranteed with an insurance policy. (See Exhibit S-24 and Transcript of the proceeding  
8 @ 104:4 to 104:25). McCullough provided the Daleys with a copy of an insurance policy. (See  
9 Transcript of the proceeding @ 105: 24 to 106:1). McCullough represented to the Daleys that the  
10 "insurance policy" guaranteed the Investment. (See Transcript of the proceeding @ 104:4 to 104:7).  
11 McCullough told the Daleys that \$10 million was backing this investment. (See Transcript of the  
12 proceeding @ 103:23 to 103:25). Although the Daleys believed the "insurance policy" guaranteed  
13 their investment and relied upon McCullough's representation, the "insurance policy" is actually a  
14 corporate blanket policy for mortgage insurance. (See Exhibit S-24) The "insurance policy" is not  
15 what McCullough represented it to be and does not provide the Daleys with any protection  
16 against the loss of their investment. (See Exhibit S-24).

17 When the Daleys inquired into who the other investors in the Investment were,  
18 McCullough told them that the other investors were "high profile" so he could not disclose their  
19 names (See Transcript of the proceeding @103:20 to 103:22). None of McCullough's investors  
20 were "high profile" but the Daleys relied upon McCullough's representation.

21 In addition, after the payments stopped McCullough represented to the Daleys that he no  
22 longer "owned" McCullough Insured Investments. (See Transcript of the proceeding @ 1187:23 to  
23 118:22). However, this is not true. McCullough remains the sole Manager and Member of  
24 McCullough Insured Investments, and an amended list of Directors has not been filed with the  
25 Corporations Division of the Commission.

26 When McCullough stopped paying the Daleys, he provided the Daleys with a variety of



1 excuses to explain his inability to repay them. (See Transcript of the proceeding @ 112:18 to  
2 114:12 and 116:3 to 116:13 and Exhibit S-14). The Daleys were unable to repay the mortgage loan  
3 on their limited income and hoped that McCullough would make their payments, as promised. (See  
4 ExhibitS-4 and Transcript of the proceeding @ 112:12 to 112:20). At one point, the Daleys  
5 contacted their mortgage company to request a reduction in their mortgage payment. (See Exhibit  
6 S-6 and Transcript of the proceeding @ 121:15 to 122:22).

7 On another occasion when McCullough failed to make the Daleys monthly mortgage  
8 payment, they received a letter purportedly signed by A.G. McCullough. (See Exhibit S-26). The  
9 letter stated that McCullough had been unavailable in the two preceding weeks because his father  
10 had died of a heart attack. A.G. McCullough testified during the administrative hearing that she did  
11 not write the letter and that McCullough's father is "healthy" and "alive". (See Exhibit S-26 and  
12 Transcript of the proceeding @ 147:4 to 147:14).

13 Trudy Daley testified during the administrative hearing that she and her husband would not  
14 have invested with McCullough if they knew that they could lose their investment or that  
15 McCullough would use the funds to pay his personal mortgage or buy jewelry. (See Transcript of  
16 the proceeding @ 123:8 to 12:10 and 123:11 to 123:16).

## 17 V.

## 18 CONCLUSION

19 The evidence produced at hearing includes the following:

- 20 A. At least, five offers and sales of unregistered securities within Arizona to investors;
- 21 B. At least, five offers and sales of unregistered securities, promissory notes;
- 22 C. At least, five offers and sales by an unregistered securities dealer or salesman,  
23 McCullough;
- 24 D. At least, five offers and sales by an unregistered securities dealer or salesman,  
25 McCullough Insured Investments;
- 26 E. At least, five offers and sales by an unregistered securities dealer or salesman,

1 Kodiak;

2 F. At least, five instances of fraud in connection with the offer and sale of securities  
3 by McCullough;

4 G. At least, five instances of fraud in connection with the offer and sale of securities  
5 by McCullough Insured Investments;

6 H. At least, five instances of fraud in connect with the offer and sale of securities by  
7 Kodiak;

8 Based upon the evidence admitted during the administrative hearing, the Division  
9 respectfully requests this tribunal to:

10 1. Order McCullough, A.G. McCullough, McCullough Insured Investments and  
11 Kodiak to pay jointly and severally restitution in the amount of \$357,475.00, pursuant to A.R.S.  
12 § 44-2032(1);

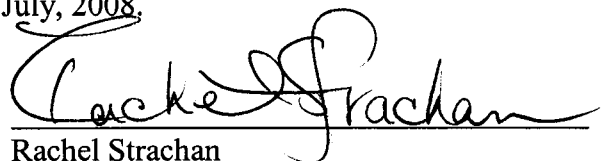
13 2. Order McCullough, A.G. McCullough, McCullough Insured Investments and  
14 Kodiak to pay an administrative penalty of not more than five thousand dollars (\$5,000) for each  
15 violation of the Act, as the Court deems just and proper, pursuant to A.R.S. § 44-2036(A). The  
16 Division recommends McCullough, A.G. McCullough, McCullough Insured Investments and  
17 Kodiak to pay jointly and severally an administrative penalty in the amount of \$100,000.00.

18 3. Order McCullough, A.G. McCullough, McCullough Insured Investments and  
19 Kodiak to cease and desist from further violations of the Act pursuant to A.R.S. § 44-2032.

20 4. Order any other relief this tribunal deems appropriate or just.

21 Respectfully submitted this 25<sup>th</sup> day of July, 2008.

22  
23 By:



24 Rachel Strachan  
25 Attorney for the Securities Division of the  
26 Arizona Corporation Commission

1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing  
2 filed this 25<sup>th</sup> day of July, 2008 with:

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 W. Washington St.  
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered this  
8 25<sup>th</sup> day of July, 2008 to:

9 Mr. Marc E. Stern  
10 Administrative Law Judge  
11 Arizona Corporation Commission/Hearing Division  
12 1200 W. Washington St.  
13 Phoenix, AZ 85007

14 COPY of the foregoing mailed this  
15 25<sup>th</sup> day of July, 2008 to:

16 Anita Geneva McCullough  
17 5450 E. Deer Valley Road  
18 Unit 3015  
19 Phoenix, Arizona 85054  
20 Respondent

21 Rick McCullough  
22 4018 E. Melinda Lane  
23 Phoenix, Arizona 85050  
24 Respondent

25 By:  \_\_\_\_\_  
26